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v.

LEE MING & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING

b

IAN HC CHIN J

[CASE NO: SC-87-15-94-I]

29 JUNE 1998

CRIMINAL PROCEDURE: Prosecution - Attorney General - Conduct of prosecution - Whether institution, conduct and discontinuance of proceedings for an offence sole prerogative of Federal Attorney General - Forestry offences - Prosecution thereof authorised by Director of Forests - Whether unconstitutional - Whether trial a nullity - Sarawak Forests Ordinance ss. 68(1), 80, 86(1), 92A - Sarawak Wild Life Protection Ordinance ss. 22(2), 39 - Federal Constitution art. 145(3)

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STATUTORY INTERPRETATION: Sarawak Forests Ordinance, s. 92A - Sarawak Wild Life Protection Ordinance, s. 39 - Constitutionality - Provisions vesting prosecutorial authority on persons other than the Federal Attorney General - Whether unconstitutional - Whether null and void

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The respondents had been prosecuted for offences under the Sarawak Forests Ordinance and the Sarawak Wild Life Protection Ordinance. The prosecution, however, proceeded not upon the authority or consent of the Federal Attorney General, but upon the authority respectively of the Director of Forests, pursuant to s. 92A of the Sarawak Forests Ordinance, and the Director of Wild Life, pursuant to s. 39 of the Sarawak Wild Life Protection Ordinance. The respondents argued in the court below that the trial was a nullity as both ss. 92A and 39 had vested prosecutorial authority on persons other than the Federal Attorney General in contravention of art. 145(3) of the Federal Constitution. The unconstitutionality of the two provisions, argued the respondents further, was also in accord with the decision in *Repco Holdings Bhd v. Public Prosecutor* ('Repco'). The learned Sessions Court Judge, subscribing to the arguments, ruled *inter alia* that the trial in respect of the charges under the Forests Ordinance was a nullity, and so acquitted and discharged the respondents without calling for their defence.

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Dissatisfied, the Public Prosecutor had moved this court for a revision of the decision, arguing (i) that the prosecuting officer had a valid authorisation to prosecute under the enabling provision of s. 92A, and (ii) that the offences being non-seizable offences, the prosecuting officer was entitled to prosecute by virtue of s. 308(ii)(b) of the Criminal Procedure Code. This contention

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- a* apart, the prosecution also argued, however, that, if the court were to make a finding of nullity, then the court should apply the doctrine of “prospective ruling” as was mooted in *Repco*, and rule, as was ruled in *Repco*, that such ruling of nullity would apply to “cases registered from today” (i.e from the date of judgment in *Repco*, namely 2 October 1997).
- b* **Held:**
- c* [1] Section 92A of the Forests Ordinance is surely in the light of *Repco* unconstitutional and null and void, as it allows person other than the Federal Attorney General to institute, conduct or discontinue any proceedings for an offence. For this same reason s. 39 of the Sarawak Wild Life Protection Ordinance is also unconstitutional and null and void. The learned Sessions Court Judge was right in concluding that the prosecution was a nullity.
- d* [2] Offences against laws other than the Penal Code punishable with imprisonment for three years and upwards but not less than seven are seizable offences, whereas those punishable with imprisonment of less than three years are non-seizable offences. That being so, at the time of the commission of the two offences under the Forests Ordinances, ie, on 4 August 1993, they were both non-seizable offences within the meaning of s. 380(ii)(b).
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- f* [3] It is clear from the wording of s. 380(ii)(b) Criminal Procedure Code that the conduct of prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local authority or statutory authority and there is not even a need to obtain sanction to prosecute from the Attorney General. It must follow, from the decision of *Repco*, that s. 380(ii)(b) contravenes art. 145(3) of the Constitution and is therefore unconstitutional and a nullity.
- g* [4] The decision in *PP v. Dato Yap Peng*, relied on by *Repco* for its prospective ruling, talks of disturbing “proceedings of convictions and acquittals which had taken place under the section prior to the date of judgment” which is totally different from “cases registered from today”. *PP v. Dato’ Yap Peng*, therefore, was intended not to affect cases where the trials had already been completed and had resulted in convictions and acquittals, and was an entirely different proposition from *Repco*’s “cases registered”.
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- i* [4a] The doctrine of prospective ruling cannot apply to trials of cases, whether registered before or after the ruling in *Repco*, which had not been concluded, that is where a decision of conviction or acquittal has not yet been delivered. To rule otherwise would be to allow such officers

to continue to prosecute in the face of the unconstitutionality, while also having the effect of postponing the effective or operative date of judgment in *Repco*, which is the date of the pronouncement of the judgment, until some unknown dates in the future when the trials have resulted in convictions or acquittals.

[4b] This court, in the circumstances, would decline to follow *Repco* where it held that the ruling would not apply to “cases registered”. The cut-off point, that is, the cases that should not be affected by the ruling of unconstitutionality, should be those that have already resulted in a conviction or acquittal.

[5] *Repco* had also interpreted art. 145(3) of the Constitution in such a way as to read into that article the word “Only” or “sole”. Its decision, in the circumstances, could only be sustained if art. 145(3) reads “**Only** the Attorney General shall have power ...” or “The Attorney General shall have the **sole** power ...”.

[5a] That the word “Only” or “sole” is missing in art. 145(3) is demonstrative of the clear intention of the framers of the Constitution that the Federal Attorney General should not be the sole or only person to institute, conduct or discontinue any proceedings for an offence. There must be other authorities other than the Federal Attorney General who can decide to commence proceedings for an offence, especially the very minor offences. That being so, this court must express its reservation as to the correctness of the decision in *Repco* and would only follow that case partly.

[6] The learned Sessions Court Judge was right in his conclusion that the trial was a nullity. The trial must be set aside and this includes the setting aside of the decision calling for the defence in respect of the charge under the Wild Life Protection Ordinance.

[Trial below a nullity; order accordingly.]

Cases referred to:

Mamat Daud v. Government of Malaysia [1988] 1 CLJ 11 (**cit**)

PP v. Chew Siew Luan [1952] 2 MLJ 119 FC (**dist**)

PP v. Dato Yap Peng [1987] 2 MLJ 311 (**foll**)

Repco Holdings Bhd v. PP [1997] 4 CLJ 740 (**refd**)

Legislation referred to:

Criminal Procedure Code, ss. 2, 377, 380(ii)(b), 418A

Dangerous Drugs Act 1952, s. 41B

Federal Constitution, arts. 121(1), 145(3)

Sarawak Forests Ordinance (Cap 126), ss. 68(1), 80, 86(1), 92A

Sarawak Wild Life Protection Ordinance, ss. 22(2), 39

- a* For the public prosecutor - Tun Abd Majid Tun Hamzah, SFC
For the accused - Kho Lik Khat; M/s Chan, Kho, Poh & Co

Reported by WA Sharif

JUDGMENT

- b* **Ian HC Chin J:**

Introduction

- c* The court was moved by the Public Prosecutor to revise a decision of the Sessions Court judge handed down on 26 June 1996 by which the Sessions Court judge ruled that the prosecution officer Lim Heng Choo (“the prosecution officer”), who was at that time a legal officer of the Sarawak State Attorney General’s Chambers, had no written authorisation to prosecute Lee Ming and Syarikat Stungkor Butan on two of three charges. The two charges were respectively under s. 86(1) and under s. 80 of the Sarawak Forests Ordinance. The trial in respect of the two charges was ended when at the end of the case for the prosecution the court declared the trial a nullity. What was relied on by the prosecution officer as constituting written authority for him to prosecute was a letter dated 18 May 1996 that was signed on behalf of the Director of Forests and it is in these terms:

- e* 18.05.96

To Whom It May Concern

- f* I, MR. LEE HUA SENG Deputy Director of Forests, Sarawak, do hereby certify and confirm that Mr. LIM HENG CHOO is a lawfully entitled to discharge the function of a Forest Officer under the Provisions of the Forests Ordinance (Cap. 126) particularly Section 92A of the said Ordinance.

“BERSATU BERUSAHA BERBAKTI”

[Signed]

- g* [LEE HUA SENG]

for Director of Forests,
Sarawak.

- h* The argument of the prosecution at the Sessions Court proceeded on the basis that the Prosecution Officer had valid authorisation under s. 92A of the Forests Ordinance in the form of the letter which I mentioned earlier. Section 92A reads:

Prosecution in respect of offences under this Ordinance or by any subsidiary legislation made hereunder may be conducted by –

- i* (a) the State Attorney General or any legally qualified officer authorised by him;
(b) the Director; or

(c) any forest officer or any other public officer generally or specially authorized in that behalf by the Director.

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That provision is surely in the light of *Repco Holdings Bhd v. Public Prosecutor* [1997] 4 CLJ 740; [1997] 3 MLJ 681, which I respectfully follow, unconstitutional, null and void as it allows person other than the Federal Attorney General to institute, conduct or discontinue any proceedings for an offence. Therefore, whatever the nature of the authorisation that was given pursuant to that provision did not clothe the prosecution officer with authority to prosecute. In this regard, the learned Sessions Court judge was right in concluding that the prosecution was a nullity.

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This brings me to the third charge which is under s. 22(2) of the Sarawak Wild Life Protection Ordinance. The offence was for being in possession of a protected plant which carries a sentence of imprisonment of one year and a fine of twenty-five thousand ringgit. The provision enabling prosecution in that Ordinance is in the following section:

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S. 39. Prosecutions in respect of offences committed under this Ordinance or any rule made hereunder may be conducted by a Wild Life Officer, or by any other person specially authorized in writing in that behalf by the Director.

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In my view, that provision suffers the same unconstitutionality and nullity because it vested prosecutorial authority on a person other than the Federal Attorney General and without the Federal Attorney General having any discretion in the institution, conduct or discontinuance of the proceedings under the Sarawak Wild Life Protection Ordinance.

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Prosecution's Argument

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When arguing that the Sessions Court judge was wrong, Mr. Tun Abd. Majid bin Tun Hamzah, learned deputy public prosecutor, had relied on s. 380(ii)(b) of the Criminal Procedure Code to say that since the prosecuting officer was an officer of a government department he was entitled to prosecute. That provision says:

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380(ii)(b) – Notwithstanding anything in this Chapter contained – in summary non-seizable cases in the court of a Magistrate – any officer of any Government department or of any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce.

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Mr. Kho Lik Kiat, learned counsel for the accused, replied that s. 380(ii)(b) has no application because the offences with which the accused were charged are seizable offences. Learned counsel had submitted on the basis that the Forests Ordinance providing for a heavier sentence was already amended at the time of the commission of the offence but it is not the case as I shall shortly demonstrate.

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- a* Both offences were alleged to have been committed on 4 August 1993. At that time the offence under s. 86(1) carried a maximum imprisonment of two years (plus other monetary penalty) but this was subsequently increased to five years and fifty thousand (plus other penalty). Whereas the s. 80 offence at the time of its commission carries a maximum sentence of one year imprisonment (plus other monetary penalties).
- b* By s. 2 of the Criminal Procedure Code, a non-seizable offence is one which a police officer may not ordinarily arrest without warrant according to the third column of the First Schedule. Offences against laws other than the Penal Code punishable with imprisonment for three years and upwards but not less than seven are seizable offences whereas those punishable with imprisonment of less than three years are non-seizable offences.
- c* Therefore, at the time of the commission of the two offences, that is on 4 August 1993, they were both non-seizable offences within the meaning of s. 380(ii)(b). However, the Forests Ordinance was amended with the result that effective on 1 February 1994 the sentence for the offence under s. 86(1) was enhanced from two years to five years making it a seizable offence. The sentence of imprisonment under s. 80 was unaffected.
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- It was after realising that the amendment providing for the enhanced sentence came subsequent to the commission of the offence and the relevant law applicable being the pre-amended section, that Mr. Kho then argued that s. 68(1) of the Forests Ordinance had made all offences arrestable and therefore all seizable offences, citing *PP v. Chew Siew Luan* [1952] 2 MLJ 119 FC. In so far as s. 68(1) is concerned it enables a forest office to arrest without warrant any person reasonably suspected of having been concerned in any forest offence if such person refuses to give his name and residence, or gives a name and residence which there is reason to believe is false or there is reason to believe that he will abscond.
- e* As for *PP v. Chew Siew Luan*, the Federal Court was concerned with the question of whether s. 388 of the Criminal Procedure Code overrides the provisions of s. 41B of the Dangerous Drugs Act 1952, both concerning the granting of bail in capital offences. The court there held that the provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code (allowing bail in certain circumstances) and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provision (disallowing bail totally) of s. 41B of the Dangerous Drugs Act. The court there also held that where a special provision is made in a special statute, that special statute excludes the operation of a general provision in the general law, applying the cardinal principle of interpretation – *Generalibus specialia derogant*.
- f* Mr. Kho then argued that since s. 68(1) of the Forests Ordinance made the two offences a seizable offence, the Criminal Procedure Code must yield to s. 68(1) of the Forests Ordinance.
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In considering that argument it must be borne in mind that s. 68(1) of the Forests Ordinance did not make all forest offences seizable offences but only so if the person suspected of committing a forest offence (1) refuses to give his name and residence or (2) gives a name and residence which there is reason to believe is false or (3) if there is reason to believe that he will abscond. Unless those circumstances (1), (2) or (3) present themselves, the offences under ss. 80 and 86(1), carrying at the relevant time a sentence of below three years, were still non-seizable offences. Therefore, those offences did not by the mere enactment of s. 68(1) become seizable offences. They remain non-seizable offences until the said circumstances are present to turn them into seizable offences. In the absence of the said circumstances, the definition of seizable and non-seizable offences given by s. 2 of the Criminal Procedure Code still apply since the offences were, at the relevant time, punishable with less than three years imprisonment. Therefore, there is no question of the Criminal Procedure Code yielding to s. 68(1) of the Forests Ordinance since they cover a different situation (the former confining non-seizable offence to cases where the maximum imprisonment is less than three years while the latter converting what otherwise would be a non-seizable offence into a seizable one when certain circumstances present themselves). The situation here is unlike that of *PP v. Chew Siew Luan* where bail for a capital offence is allowed under the Criminal Procedure Code and not under the Dangerous Drugs Act.

Whatever it is, art. 145(3) of the Constitution again comes into play. Any provision which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence must necessarily fall foul of art. 145(3). In this regard s. 380(ii)(b) which the prosecution relies on as allowing the prosecution officer to prosecute must be examined to see whether it falls foul of art. 145(3). It is clear from the wording of s. 380(ii)(b), which I have earlier reproduced, that the conduct of prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local authority or statutory authority and there is not even a need to obtain sanction to prosecute from the Attorney General. It must follow from the decision of *Repco Holdings Bhd v. Public Prosecutor* that s. 380(ii)(b) is also unconstitutional and a nullity. Not only that, every legislation, be it State or Federal, which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence would also be unconstitutional and a nullity.

I am not unaware that there was a passing reference to s. 380(i) in *Repco Holdings Bhd v. Public Prosecutor*, p. 690, where it was said that s. 380(i) was of no assistance because members of the Securities Commission were not public officer which may give rise to the implication that s. 380(i) is still valid and not unconstitutional. Such an implication cannot be drawn because s. 380(ii) is also, for the same reason which I have already stated, unconstitutional.

- a* There remains one issue which is the question as to the meaning of “prospective ruling”. It was urged that I should follow the ruling in *Repco Holdings Bhd v. Public Prosecutor*, p. 692, that the ruling includes “cases registered from today”, the date of which is 2 October 1997 and the court relied on, as supporting that ruling, the cases of *PP v. Dato Yap Peng* [1987] 2 MLJ 311 and *Mamat bin Daud v. Government of Malaysia* [1988] 1 CLJ 11; [1988] 1 MLJ 119. I have now to examine whether those two cases lay down the law that a ruling can be made to apply to “cases registered” from the date of the judgment.

- b* *PP v. Dato Yap Peng* concerns s. 418A of the Criminal Procedure Code which the Supreme Court held to be unconstitutional and void as being an infringement of the provisions of art. 121(1) of the Federal Constitution. It also held that the doctrine of prospective overruling would be applied so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions and acquittals which had taken place under the section prior to the date of the judgment in this matter would remain undisturbed and not be affected. This is what the Federal Court, at p. 320, said:

- c* The doctrine – to the effect that when a statute is held to be unconstitutional, after overruling a long-standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions and acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed – can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it – to be
- d* adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.

- e* Clearly then that case talks of disturbing “proceedings of convictions and acquittals which had taken place under the section prior to the date of judgment” which is totally different from “cases registered from today”. In my view, the decision in *PP v. Dato Yap Peng* was intended not to affect cases where the trials had already been completed and had resulted in convictions or acquittals which is an entirely different proposition from “cases registered”. As for *Mamat bin Daud v. Government of Malaysia*, there is no exposition on the law as to the extent of the prospective ruling.

- f* It is relevant to consider the position of the cases that were pending in the subordinate courts on 2 October 1997, pending in the sense (1) the trial had not yet commenced and (2) the trial had commenced but not completed yet. If the trials of those cases are to commence or to continue today it would mean that they are being continued despite the same having been commenced or conducted in violation of the Constitution. It would constitute a continuing violation in the

face of the ruling of the court in *Repco Holdings Bhd v. Public Prosecutor* which is not something which the decision in *PP v. Dato Yap Peng* had intended. What was intended by a prospective ruling is that it should not affect concluded trials. It cannot apply to trials of cases, whether registered before or after the ruling in *Repco Holdings Bhd v. Public Prosecutor*, which had not been concluded, that is where a decision of conviction or acquittal has not yet been delivered. To rule otherwise would be to allow such officers to continue to prosecute in the face of the unconstitutionality while also having the effect of postponing the effective or operative date of the judgment in *Repco Holdings Bhd v. Public Prosecutor*, which is the date of the pronouncement of the judgment, until some unknown dates in the future when the trials have resulted in convictions or acquittals. There is no need for such a result. I do not see any harm in those cases being recommenced.

I am not unaware that the Criminal Procedure Code had been amended by Act A1015 which came into force on 1 April 1998 and which was enacted as a result of *Repco Holdings Bhd v. Public Prosecutor*. Section 377 had been amended to, among others, provide for various persons (who are not Public Prosecutor, Senior Public Prosecutor, Deputy Public Prosecutor or Assistant Public Prosecutor) to conduct prosecution subject to the control and direction of the Public Prosecutor. The old section s. 380 had been removed. This action of the Legislature appears to support my conclusion that s. 380(ii)(b) was also unconstitutional. But I am more concerned with the saving provision of Act A1015 which reads:

11.(1) The provisions of this Act shall not apply to any prosecution or proceeding which has been instituted but has not been completed on the date of the commencement of this Act.

(2) No finding, judgment, sentence or order of any court made or passed or imposed before the date of the commencement of this Act or during or at the conclusion of any prosecution or proceeding referred to in subsection (1) shall be reversed, altered or affected by any provision of this Act.

That saving provision, in my view is only concerned with the effect of the provisions of Act A1015. It does not in any way affect what has been decided in *PP v. Dato Yap Peng* concerning prospective ruling. In any event, s. 11(2) talks of “finding, judgment, sentence or order” and not with continuing a prosecution which was commenced unconstitutionally. Therefore, the amendment has no bearing on the issue at hand.

For the reasons I have stated, I would respectfully decline to follow *Repco Holdings Bhd v. Public Prosecutor* where it held that the ruling would not apply to “cases registered”. The cut-off point, that is, the cases that should not be affected by the ruling of unconstitutionality should be those that have already resulted in a conviction or acquittal.

a Conclusion

b For the reasons stated, the learned Sessions Court judge was right in his conclusion that the trial was a nullity. The trial must be set aside and this includes the setting aside of the decision of the learned Sessions Court judge in calling for the defence on the other charge. There is a lesson to be learned from all this. If the trial in this case had been completed at one continuous sitting in 1994 and not been staggered and carried over a long period of time, it would not have to suffer the fate that befalls it now.

c Further, what I have said here must be true also of every prosecution that is now pending before the subordinate courts for offences under any State legislation or bye-law where prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local authority or statutory authority and where there is no sanction to prosecute from the Federal Attorney General.

d However, I have reservation about the correctness of *Repco Holdings Bhd v. Public Prosecution* with regard to the question of the interpretation of art. 145(3) of the Constitution. But, because Parliament had enacted an amendment to the law concerned as a result of the decision of *Repco Holdings Bhd v. Public Prosecutor*, I will not give a differing judgment as that would cause too much of an upheaval

e which may not serve the interest of justice. After all, all that is now required is, as would appear to be the intention, the appointment of the officers concerned to conduct the prosecution. But I will now explain why I have my reservations. It will be noticed that *Repco Holdings Bhd v. Public Prosecutor* had interpreted art. 145(3) in such a way as to read into that article the word “only” or “sole”. The

f relevant words of that article are: “The Attorney General shall have power ...”. The conclusion of *Repco Holdings Bhd v. Public Prosecutor* can only be sustained if the word “Only” is added to make the relevant part of that clause to read: “Only the Attorney General shall have the power ...”; or the word “sole” is added so that it reads: “The Attorney General shall have the sole power ...”. In my view,

g that the word “Only” or “sole” is missing is demonstrative of the clear intention of the framers of the Constitution that the Federal Attorney General should not be the sole or only person to institute, conduct or discontinue any proceedings for an offence. But the Federal Attorney General still has power under the said Article to control the prosecution. There must be other authorities other than the Federal Attorney General who can decide to commence proceedings for an offence,

h especially very minor offences like those dealing with stray or unlicensed dogs, littering, illegal hawking, handling food without a health licence, registration of buffaloes, registration of bicycles and so on. The more serious offences are those under the various ordinances and enactments, like felling timber from a forest. The decision whether to institute proceedings in respect of those offences has

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throughout the years been very properly and wisely left to the various local authorities and the officers of the State Attorney-General's Chambers. They have been entrusted by the legislators to perform their duties by the enactment of Ordinances or Bye-Laws and, in my view, that intention of the legislators was made clear by the omission of the word "Only" or sole from the said Article. Now, with the decision in *Repco Holdings Bhd v. Public Prosecutor*, it would mean that those local authorities cannot decide on the institution without the Federal Attorney General first having a look at the file relating to the matter because the power is "exercisable at his discretion". I do not think the Federal Attorney General can simply sign away the exercising of his discretion by a wholesale appointment of prosecutors under the said recent amendment to the Criminal Procedure Code as that may be against the Article requiring him to personally exercise that discretion. I cannot imagine our legislators burdening the Federal Attorney General with the minor offences which I have mentioned. For the reasons I have stated, I have my reservation about the correctness of the decision in *Repco Holdings Bhd v. Public Prosecutor* which I follow in part because I do not wish to add to the uncertainty regarding the pending cases.

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